FILE COPY

Office Supreme Court, U.S.
FILED
OCT 27 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

Nos. 45 and 46

FEDERAL POWER COMMISSION,

Petitioner,

v.

TRANSCONTINENTAL GAS PIPE LINE CORPORATION, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., and THE CITY OF NEW YORK,

Respondents

NATIONAL COAL ASSOCIATION, *et al.*,

Petitioners,

v.

TRANSCONTINENTAL GAS PIPE LINE CORPORATION, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., and THE CITY OF NEW YORK,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT THE CITY OF NEW YORK

CHARLES H. TENNEY
SEYMOUR B. QUEL
Attorney for Respondent
The City of New York,
Municipal Building,
New York 7, New York.

FRANCIS X. HOWLEY,
of Counsel.

249 Press of Fremont Payne, Inc., 80 Washington St., N. Y. — BOwling Green 9-8...

TABLE OF CONTENTS

	PAGE
Questions Presented	1
Statement	2
Argument:	
The Commission's order denying the X-20 certificate is arbitrary and capricious and unsupported by any substantial evidence of record	3
Conclusion	11

TABLE OF AUTHORITIES

Houston Texas Gas & Oil Corp., 16 FPC 118 (1956)	10
Midwestern Gas Transmission Company, 21 FPC 653 (1959)	10
Administrative Procedure Act, § 9(e), 60 Stat. 243 (1946), 5 U.S.C. § 1009(e)	3
Air Pollution Control Act of 1955, 69 Stat. 322 (1055), 42 U.S.C. § 1857	8
Natural Gas Act, § 19(b), 52 Stat. 831 (1938), 15 U.S.C. § 717(r)	4
Executive Order No. 10779, 23 Fed. Reg. 6487 (1958)	9
S. Rep. No. 389, 84 Cong., 1st Sess. (1955)	8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

Nos. 45 and 46

FEDERAL POWER COMMISSION,

Petitioner,

v.

TRANSCONTINENTAL GAS PIPE LINE CORPORATION, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., and THE CITY OF NEW YORK,

Respondents.

NATIONAL COAL ASSOCIATION, *et al.*,

Petitioners,

v.

TRANSCONTINENTAL GAS PIPE LINE CORPORATION, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., and THE CITY OF NEW YORK,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT THE CITY OF NEW YORK

Questions Presented

In our view this Court should dispose of these cases and affirm the judgment of the lower Court on the ground that the Commission exceeded its jurisdiction in attempt-

ing to control Con Edison's* non-jurisdictional purchase in the field and attempting to control Con Edison's use of its gas in New York City. These questions and the supporting reasons for the lower Court's decision are adequately and fully set forth in that Court's decision and also in the briefs of the other respondents herein. We rely upon those statements and will not repeat those arguments in this brief.

In the event, however, that this Court does not base its decision upon the jurisdictional questions it will be necessary for the Court to consider the alleged arbitrary nature of the Commission's denial of Transco's** application for a certificate of public convenience and necessity, and it is to this question alone, which may be stated as follows, that we direct our attention in this brief:

> Did the Commission act in an arbitrary and unlawful manner in substantially ignoring the evidence of the benefits that the X-20 service would provide for the people of the City of New York and in denying the certificate to Transco on the basis of "policy considerations" that are unsupported by any substantial evidence and are contrary to reason?

Statement

The single question to which this brief is addressed necessarily involves inquiry into the facts of record and the supporting reasons advanced by the Commission as grounds for its conclusions. Rather than state the facts of record and then restate them in our argument we shall rely upon the statement of the case as presented in the briefs of the other respondents herein and shall set forth in our argument those facts which are necessary to show the arbitrary character of the Commission's orders.

---

* Consolidated Edison Company of New York, Inc.
** Transcontinental Gas Pipe Line Corporation

ARGUMENT

The Commission's order denying the X-20 certificate is arbitrary and capricious and unsupported by any substantial evidence of record.

This brief is filed on behalf of the more than 8,000,000 people of the City of New York. These people include not only the many thousands of persons directly affected by the stack emissions of Con Edison's Waterside plant but also the millions served by Con Edison and other utilities with gas, electricity and steam for heating. The City itself is a large consumer of gas and electricity and is vitally interested in the level of the rates charged for those services. The City actively supports Transco's application for authorization to render the X-20 service, because it believes that the proposed service would benefit the health, comfort and economic well-being of the people of the City of New York.

The interest of the City is direct and immediate. This is in contrast to the parties who have filed briefs *amici curiae*. Their only concern, a claimed long term adverse effect upon gas supply and prices, is grounded entirely upon the Commission's unsupported speculation and conjecture. Of course New York City would not now be vigorously supporting the X-20 service if it thought that such support would adversely affect the millions of ultimate consumers contained within the City's boundaries.

Section 9(e) of the Administrative Procedure Act, 60 Stat. 243 (1946), 5 U.S.C. § 1009 (e), provides that a reviewing Court shall "hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, and an abuse of discretion or otherwise not in accordance with law; . . . (5) unsupported by substantial evidence in any case subject to the requirements of §§ 1006 and 1007 of this title, or otherwise reviewed on the record of an agency hearing provided by statute . . ." The

Natural Gas Act, in giving authority to courts to review actions of the Commission, provides that the factual findings of the Commission shall be conclusive only "if supported by substantial evidence". Natural Gas Act, § 19(b), 52 Stat. 831 (1938), 15 U.S.C. § 717(r).

The Commission premised its denial of Transco's X-20 certificate application upon two grounds: (1) the alleged adverse effect of Con Edison's direct non-jurisdictional purchase of natural gas in the field upon prices and gas supply, and (2) the "inferior" nature of the proposed use of Con Edison's natural gas in its Waterside station for the purpose of abating air pollution.

The Commission's first ground is not supported by any evidence of record. The lower Court has demonstrated the unfounded nature of the Commission's assertions. The briefs of the respondents also detail the speculative and conjectural nature of the Commission's objections to Con Edison's purchase in the field. We shall not elaborate upon their carefully reasoned statements.

The Commission's second ground for decision—the allegedly "inferior" character of the proposed end use—flies in the face of all the evidence. It ignores the seriousness of a problem that is causing increasing concern among experts in the field of air pollution. It disregards all of the evidence with respect to the particular nature of the use here proposed and the clearly demonstrated benefits to the health and economic welfare of the people of the City of New York. It represents blind acceptance by the Commission of its own dogma, unsupported by anything in the Act or the legislative history thereof, that boiler fuel use is necessarily "inferior".

The Commission's adherence to the proposition that all boiler fuel use is *per se* "inferior" was disputed by the lower Court and is clearly contrary to reason and to all of the substantial evidence of record in this case. If ever

there was a situation where the peculiarly valuable burning characteristics of natural gas made its use desirable from the viewpoint of the public interest, this is that case.

Con Edison's Waterside station is situated in Manhattan near 42nd Street and the East River, in one of the world's great population centers. When it was constructed almost 60 years ago it occupied an undesirable piece of property adjoining slaughter houses and low lying slum buildings. At that time it made very little difference to the public what fuel was used or how it was burned (R. 14a). The electric and steam load was only a fraction of its present load and the consumption of coal was correspondingly less (R. 8a).

In the years since then, a new city has been built around the Waterside station. The slaughter houses have been replaced by the United Nations buildings and modern residential apartment complexes such as Tudor City; other large buildings have been erected nearby, including Grand Central Station, a number of important hotels, and many foreign consulates and legations. There were at the time of the hearings in 1958, within an area of only one half square mile in the vicinity of the Waterside plant, no less than 66 buildings of more than 18 stories (R. 14a, 42a)—a situation that aggravates the air pollution problem.

The building of this new city within a city required an enormous increase in the electricity output of the Waterside station, its rated capacity actually having quadrupled (R. 8a-9a). The mid-Manhattan area has the greatest concentration of electric and steam loads in Con Edison's system (R. 32a). With this increase in capacity, the consumption of coal and the resultant discharge of pollutants have also increased (R. 8a).

The City for years has campaigned intensively for a reduction in air pollution. The Waterside plant has been one of the focal points of this campaign. Con Edison has spent over $45,000,000 throughout its system and more

than $3,600,000 at Waterside to reduce stack emissions (R. 8a-9a, 49a-50a). However, despite these expenditures, Con Edison has been unable, because of physical space limitations, to eliminate stack emissions at Waterside.

It was against this background that the City intervened in the proceedings before the Federal Power Commission and urged approval of the X-20 service. It presented as its witness its then Commissioner of Air Pollution Control, Dr. Leonard Greenburg. The qualifications of Dr. Greenburg in the field of public health and air pollution control are truly outstanding, entitling him to a position of national and international renown in his sphere. He testified both as a doctor of medicine and a licensed professional engineer, as well as an expert by reason of education, training and experience in public health, occupational disease prevention and industrial hygiene (R. 37a-38a).

Dr. Greenburg ultimately concluded that no plan other than the use of natural gas at Waterside would give the inhabitants of the City the relief they need from the effects of the huge quantities of fly ash, sootfall and sulphur dioxide emitted from the Waterside stacks (R. 52a). Despite the relatively high efficiency of mechanical dust collectors with electric precipitators installed at Waterside (R. 90a), it was shown that each day the air is polluted from the Waterside station by more than 13½ tons of fly-ash (R. 140a), and 21 tons of sulphur dioxide from boilers 71 and 72* alone (R. 41a-42a). As the result of tests, it was determined that the sootfall in the vicinity of Waterside is more than twice that in other parts of the City (R. 115a-116a).

In order to continue using coal in boilers 71 and 72 it would be necessary to rebuild the boilers at a cost of more than $12,000,000. The rebuilding job would take

* The two most troublesome of the 10 boilers at the Waterside Station.

two years for each boiler and, wholly apart from the enormous cost, it would not be possible to remove their capacity from the system and at the same time provide adequate service to consumers (R. 15a-16a). Even the possibility of increasing the stack height to 700 feet was considered but had to be rejected as impractical (R. 87a-88a).

The effects of the pollution emanating from Waterside and of air pollution in general, as described by Dr. Greenburg, are startling. Air pollution is more than an irritating nuisance. Health may be adversely affected, especially in persons liable to asthma and certain respiratory ailments. At least a suspicion exists that air pollution may contribute to the increase in lung cancer and some forms of heart disease. On the economic side, it causes damage to buildings, painting, clothing, vehicles, and many other items. Flights of aircraft in the New York metropolitan area are hampered by poor visibility brought about by air pollution, increasing potential hazards at the airports (R. 40a).

Dr. Greenburg's concluding remarks, sounding a note of warning, are worth repeating:

> "• • • we must not overlook the fact that the very air we breathe is perhaps our most precious natural resource. This is not replaceable. We live in an envelope of air and we cannot afford to have our atmosphere become polluted to any great degree. The ingenuity of man can find and develop many sources of power and many sources of food, but there is no substitute for the atmosphere in which we live and work. Air pollution cannot continue to remain an uncontrolled problem. Depletion of this natural resource must be avoided at all costs." (R. 53a)

The growing awareness of the menace of air pollution is reflected in the Congressional declaration of policy in

the Air Pollution Control Act of 1955 that provides:

> "In recognition of the dangers to the public health and welfare, injury to agricultural crops and livestock, damage to and deterioration of property hazards to air and ground transportation, from air pollution, it is declared to be the policy of Congress to preserve and protect the primary responsibilities and rights of the States and local governments in controlling air pollution, to support and aid technical research to devise and develop methods of abating such pollution, and to provide Federal technical services and financial aid to State and local government air pollution control agencies and other public or private agencies and institutions in the formulation and execution of their air pollution abatement research programs." (42 USC § 1857, July 14, 1955, c. 360, § 1, 69 Stat. 322.)

The need for such legislation and the reason for its enactment by Congress are forcefully set forth in the Senate report accompanying the bill. Senate Report No. 389, 84 Cong., 1st Sess. (1955):

> "There is no doubt that the emission of fumes and particles into the air above heavily populated communities and industrial centers is causing a condition described in a variety of terms, including 'smog' and 'smaze.'
>
> "While a few areas have attracted unusual attention because of air contamination the problem is rapidly becoming serious and causing alarm in many places. Tragic results have followed unexplained occurrences of fumes, fog, and murkiness in the past, as in the Meuse Valley in Belgium, in London, in Donora, Pa., and in Poza Rica, Mexico, during present history.
>
> "Considerable publicity has been given to 'smog' sieges in Los Angeles and public officials have in-

dicated fear that like conditions may be developing in such widely separated cities as New York and Cleveland."

The President has recognized the serious nature of the air pollution problem. In August, 1958, five months prior to the Commission's order in the X-20 case, the President issued Executive Order No. 10779 (23 Fed. Reg. 6487) directing federal agencies to cooperate with state and local authorities for the control of air pollution. This Executive Order provides:

> "The heads of the departments, agencies, and independent establishments of the executive branch of the Government shall take such action as may be practicable and consistent with law, in cooperation with State and local authorities concerned with the control of air pollution, to insure the prevention or abatement of atmospheric pollution caused by or resulting from Federal activities, including industrial and manufacturing processes operated or controlled by the Federal Government and the destruction of foodstuffs or other materials by order, or under the supervision, of Federal regulatory authorities, in a manner consistent, so far as feasible, with programs authorized under State or local law pertaining to the preservation of the cleanliness of the atmosphere and applicable to the agencies of governmental bodies creating such law and to the public generally.
>
> Dwight D. Eisenhower"

These statements of Congressional and Administration policy, taken together with the wealth of evidence in this particular case, both of a factual and opinion nature, demonstrate the seriousness of the air pollution problem and raise questions as to the reasons for the Commission's unwillingness to adhere to this policy and to rely

upon the facts of record. For example, the Commission states in its brief (p. 53) that in considering the public interest and convenience it is required to consider the "important Congressional policies which permeate other legislation". Why in this case has the Commission ignored and decided counter to the "important Congressional policies" relating to air pollution? Why has the Commission, after granting upon economic grounds almost all boiler fuel applications directed to it during the last 15 years,* denied the X-20 program which would provide not only substantial economic benefits but also vital health advantages? Why did the Commission consider the boiler fuel purchase and transportation arrangement in *Houston Texas Gas & Oil Corp.*, 16 FPC 118 (1956), as required by the public convenience and necessity and find to the contrary in the instant case where the gas was destined for the New York area instead of Florida? Why, after its decision in this case, did the Commission return to its former practices in *Midwestern Gas Transmission Company*, 21 FPC 653 (1959), where the gas was destined for the middle-west instead of the New York area? In that proceeding Commissioner Kline, dissenting, stated, with reference to the Transco X-20 case,

> "In that case, to my mind a borderline case, the sale for boiler fuel purposes was, in effect, interruptible for a period of 60 days, provided substantial benefits to the domestic users and, in addition, the granting of that application would have helped alleviate the soot problem arising from the use of coal as boiler fuel in generating stations in the vicinity of the United Nations Building. Certainly, it had far more merit than the present application. To certificate this project is a complete reversal of our stand in the *Transcontinental* case." (21 FPC 653, 670)

---

* See decision of the lower Court, R. 316-318.

Upon the facts herein we respectfully submit that the use of natural gas as boiler fuel must be considered a superior use and a positive reason for the granting of the X-20 certificate rather than an element militating against such grant. In view of the Commission's complete disregard of Congressional policy, the evidence of record, and matters of general knowledge, and in view of its action in labeling the proposed use of natural gas at the Waterside station as an inferior use it is clear that its denial of a certificate to Transco, both upon the grounds of end use and the effect of Con Edison's direct purchase in the field, must be set aside as arbitrary and unlawful, even if it is assumed *arguendo* that the Commission had the power to act upon matters outside its jurisdiction.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

CHARLES H. TENNEY
SEYMOUR B. QUEL
Attorney for Respondent
City of New York,
Municipal Building,
New York 7, New York.

FRANCIS I. HOWLEY,
of Counsel

October 27, 1960.